COMMERCIAL PLASTIC INDUSTRIES SDN BHD

v.

LIM CHIN CHEAP & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL APPEAL NO: R1-12-650-2000]
27 SEPTEMBER 2002

CIVIL PROCEDURE: *Judgments and orders - Application to amend order - Amendment to include interest on principal sum - Interest all along disputed by opposite party in earlier proceedings and waived by applicant before judge - Whether to allow amendment would prejudice opposite party - Whether application could be allowed as order not perfected*

CIVIL PROCEDURE: *Judgments and orders - Application to amend or vary order not perfected - Inherent power of court to amend order - In what circumstances*

At the sessions court, the appellant as plaintiff, applied for summary judgment under O. 26A of the Subordinate Courts Rules 1980 against the respondents as defendants for a sum of RM43,383.23, *ie*, RM40,796.25 being the principal sum and the balance being interest. The application, however, was dismissed. On appeal to the judge in chambers, the judge was informed that the appellant was willing to waive the entire interest claimed and seek judgment for the principal sum. The respondents had all along disputed the interest claimed and with the waiver thereof, they were informed by the judge that they need not submit on the issue of interest. The judge then allowed the appeal for the principal sum with **interest from the date of the order ('the Order') until full settlement**. A draft order was prepared by the appellant and sent to the respondents for approval which was duly approved and returned to the appellant. The appellant now filed this application to amend the Order to include the earlier interest claimed. The appellant claimed that the interest waived was only in relation to the post-judgment interest and not pre-judgment interest and that it was a mistake on the part of counsel.

Held:

[1] An order pronounced by a court can always be withdrawn, altered or modified by the same court until it is drawn up, passed and perfected. Also, when a court has pronounced judgment, it retains control over the case until the order giving effect to its judgment is formally perfected.

Such control must be used in accordance with judicial discretion. The power of a court to recall an unperfected order is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent or otherwise, so long as the order is not perfected. The case of *Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd* went a step ahead when it held that the court can still review an order that is extracted or perfected but with the consent of both parties or as expressly provided by the RHC. (pp 699 g-i & 700 a-c)

[2] In practice, when an order is pronounced by a court, one of the parties (usually in whose favour the order is granted) will prepare a draft order, send it to the other parties for approval or amendment (if any). After that the draft order is sent to the court's registrar for approval. Once the order is approved by the Court Registrar, a fair or formal order is prepared and sent to the Court Registrar for attestation and court seal. Only at that stage of the process can an order be said to have been passed, entered and perfected. (p 700 f-g)

[3] The power to amend or vary an order granted must be exercised judicially and not capriciously. It must only be exercised in exceptional cases where the justice of the case requires. (p 700 h)

[4] In exercising the power to amend or vary an order, the court must look at the intention of the court in pronouncing the order so as to bring it into harmony with the order the court obviously intended or meant to pronounce. In exercising such power the court is not functus officio as the order has not been perfected, and the court will hear it subject to the restrictions as explained. (pp 701 i & 702 a-e)

[5] In the present case, the Order had not been perfected yet. Even though the draft order was prepared by the appellant and later approved by the respondents, the draft order had not been passed and entered by the Court Registrar. Therefore, this court had an inherent power to amend or vary the Order. (p 702 f)

[6] The respondents had all along disputed the claim on interest and the appellant informed the judge that it was willing to waive the entire interest claimed. The records of proceedings clearly showed that counsel for the appellant knew what he was saying and clearly meant it. Therefore, the remedy under O. 20 r. 11 RHC did not apply. There was no error or accidental omission in the Order as pronounced by the judge. The judge had clearly applied his mind to the issue of interest. The Order expressed the court's intention in the matter. Therefore, it was not proper for the court to amend or vary the Order. (p 703 a-g)

[7] From the record of proceedings, the appellant had hoped to benefit from the statements made to the judge so that its appeal could be allowed on the ground that there were no triable issues. The effect of the amendment as prayed by the appellant would be in total contradiction with what the appellant's counsel informed the judge in getting the appeal allowed. Had the claim on interest not been waived by the appellant, the respondents might be allowed to submit on that point before the judge and the judge might not have decided in favour of the appellant in allowing the appeal. To allow the appellant's application under the present circumstances of the case would obviously prejudice the respondents. Also, the question whether the appellant was entitled to the interest under the relevant agreement and the question of "unjust enrichment" on the part of the respondents did not arise. (p 704 b-f)

[8] There was no mistake on the part of counsel for the appellant when he informed the judge that the appellant willingly waived the entire interest claimed. The counsel knew the nature and the consequences of the statement made to the judge. He knew what he was going to achieve by making such statements before the judge. Even if it was considered as a mistake on his part, it was not within the scope of the court's power to amend or vary the Order having regard to the circumstances of the case. (pp 705 g-i & 705 a-b)

[Application dismissed.]

Case(s) referred to:

Chua Wah Keaw v. Ng Ho Huat [1961] 1 MLJ 321 ***(refd)***
Huddersfield Banking Co Ltd v. Henry Lister [1895] 2 Ch D 273 ***(refd)***
In re Inchcape (Earl of), Craigmyle v. Inchcape [1942] 1 Ch 394 ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Co (No 2) [1968] 1 MLJ 265 ***(foll)***
Millensted v. Grosvenor House (Park Lane) Ltd [1937] 1 KB 717 ***(refd)***
Owners of Cargo carried in the Ship "Gang Cheng" v. Owners and/or Persons Interested in the Ship "Gang Cheng" (No 2) [1998] 5 CLJ 548 ***(refd)***
Pittalis & Ors v. Sherefittin [1980] 2 All ER 227 ***(refd)***
Re Harrison's Settlement [1955] 1 All ER 185 ***(refd)***
Sykt Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd [1991] 1 CLJ 809; [1991] 4 CLJ (Rep) 22 ***(foll)***
Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 CLJ 845 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 13 r. 9, O. 14 r. 11, O. 19 r. 9, O. 20 r. 11
Subordinate Courts Rules 1980, O. 26A

For the appellant - Cheah Poh Gek; M/s Cheah Poh Gek & Assoc
For the respondents - Lee Sze Yin; M/s ST Lee & Partners

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:
This is an application by the appellant/plaintiff (*vide* encl. 10) to amend an earlier court decision dated 14 May 2002 to include a new item ie, "interest on the amount RM40,796.25 at the rate of 2% per month from 14 October 1998 up to 14 May 2002."

The full prayers in the said application are as follows:

1. that the court revise or allow hearing (if necessary) on the issue of interest;
2. that the appellant be allowed to amend the order given on 14.5.2002;
3. that amendment be included as follows:
   (a) faedah ke atas jumlah RM40,796.25 pada kadar 2% sebulan daripada 14.10.1998 sehingga 14.5.2002;
4. that costs of the application be in the cause.

Factual Background
The appellant/plaintiff, at all material times, was a supplier of plastic resin. The appellant/plaintiff supplied the products to one Meister Plastic Industries (M) Sdn. Bhd. on credit terms, up to the maximum value of RM100,000 *vide* a credit sale letter dated 4 May 1998, which was signed by the 1st respondent who was a director of Meister Plastic Industries, for and on behalf of the said company. Among the terms of the said sale letter is that Meister Plastic Industries was given a credit facility up to an amount of RM100,000 upon a credit term of 60 days whereupon all outstanding amounts were subject to interest at the rate of 2% per month.

The said credit facility was guaranteed by a letter of guarantee duly executed by the three respondents/defendants, as guarantors who had agreed to jointly and severally to guarantee the debt for a maximum sum of RM120,000. The said products were supplied and delivered to Meister Plastic Industries as listed in the relevant invoices which have been acknowledged receipt. Meister Plastic Industries failed to make payment as agreed. Therefore the appellant/plaintiff filed an action against all the three respondents/dependants in the Sessions Court, Kuala Lumpur claiming for a sum of RM43,383.23 (ie, RM40,796.25 as principal amount and the balance as interest at the rate of 2% per month).

At the Sessions Court Kuala Lumpur, the appellant/plaintiff applied for an order under O. 26A, of the Subordinate Courts Rules 1980, for a summary judgment. The learned Sessions Court judge found that there were triable issues and accordingly dismissed the appellant/plaintiff's application on 7 December 2000.

The appellant/plaintiff then filed an appeal to the High Court. At the appeal stage, both parties made their respective oral submissions on 14 May 2002 before the judge in chambers. At the end of the proceeding the court (on the same day) allowed the appeal with cost, but only for the sum of RM40,796.25 with interest from the date of the order (14 May 2002) at 8% until full settlement. A draft order was prepared by the appellant's counsel and sent to the respondent's counsel for approval. It was approved by the respondent's counsel and sent back to the appellant's counsel on 4 June 2002.

From the notes of proceedings, at the appeal stage before the judge-in-chambers, it appears that the appellant's counsel had informed the judge that there was no triable issues in the appellant's claim against the respondents as the respondents have not disputed the principal amount claimed; and that the respondents were only disputing the interest charged.

The appellant's counsel also told the court that the plaintiff (appellant) was willing to waive the entire interest claimed, and seek judgment for the principal sum. At one stage of the proceeding, the judge had recorded that the counsel for the respondents need not submit on the issue of interest because the plaintiff (appellant) had agreed to waive it.

On 20 June 2002 the applicant/plaintiff filed the present application.

Submissions By Appellant's Counsel

The appellant's counsel submitted that the 2% per month interest has been agreed by the parties in the sale letter dated 4 May 1998, and therefore the appellant is entitled to the amount charged. The appellant's counsel further submitted that issue relating to interest is not a triable issue. On the question that the said interest was waived, the appellant's counsel clarified that it was a mistake on the part of the counsel for the appellant (at the appeal stage before the judge-in-chambers on 14 May 2002) to waive the entire interest. The counsel concerned should have clarified to the judge that what he meant by waiving the interest is only referring to the post-judgment interest, but not pre-judgment interest. The counsel concerned had admitted the mistake in his affidavit-in-support of the present application (encl. 9).

The appellant's counsel also submitted that the respondents are liable to pay the appellant the interest charged and are not entitled to unjust enrichment by not paying the amount.

Submissions By Respondents' Counsel

The respondents' counsel on the other hand argued that, from the notes of proceeding before the judge-in-chambers on 14 May 2002, the appellant counsel, at that time, had clearly and willingly informed the judge that the appellant was willing to waive the entire interest claimed. Therefore the order made by the judge is good and effective. Further, the respondents' counsel also argued that the draft order was approved by the respondent's counsel and sent back by the respondents' counsel to the appellant's counsel and therefore it was too late for the appellant to apply to this court to amend or vary the order.

Further it was also argued that the present application, filed on 20 June 2002, was made more that one month after the date of the order.

Finally, the respondents' counsel argued that the respondents had disputed the interest claimed right from the beginning of the proceeding. Therefore, if the appellant is allowed to amend or vary the order as applied, then the implication is that there are issues to be tried and the appellant is not entitled to a summary judgment as allowed by the court on 14 May 2002.

Issues

The issues to be determined by the court in the present application are as follows:

i) whether this court has power to amend or vary its own decision which has been granted earlier; and

ii) whether, on the facts and circumstances of the present case, the appellant's application might be granted.

Findings Of The Court

It is now well settled that an order pronounced by a court can always be withdrawn, altered, or modified by the same court until it is drawn up, passed and perfected. It is also well settled that when a court has pronounced judgment, it retains control over the case until the order giving effect to its judgment is formally perfected; such control however, must be used in accordance with judicial discretion. The principle relating to the power of a court to recall an unperfected order has been laid down by the English Court of Appeal in *Re Harrison's Settlement* [1955] 1 All ER 185. This principle was followed by our Federal Court in the case of *Ling Nam Rubber Works v. Leong Bee & Co (No. 2)* [1968] 1 MLJ 265. It was also followed by our High Court in *Syarikat Marak Jaya Sdn. Bhd. v. Syarikat Masinda Sdn. Bhd.* [1991] 1 CLJ 809; [1991] 4 CLJ (Rep) 22 and *Owners of Cargo carried in the Ship "Gang Cheng" v. Owners and/or Persons Interested in the Ship "Gang Cheng" (No. 2)* [1998] 5 CLJ 548.

This power is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent or otherwise, so long the order has not been perfected ie, drawn up, passed and entered, (see: *Huddersfield Banking Co. Ltd. v. Henry Lister* [1895] 2 Ch. D. 273). In fact, Peh Swee Chin J in *Syarikat Marak Jaya* went a step ahead when His Lordship held that when an order is extracted or perfected, the court can still review the same but only with the consent of both parties or as expressly provided by the Rules of the High Court 1980, to give a few examples, in cases of setting aside judgment in default of appearance under O. 13 r. 9; setting aside judgment in default of pleadings under O. 19 r. 9; setting aside judgment in default of appearance at the hearing under O. 14 r. 11; or under O. 20 r. 11 where the order does not correctly set out the manifest intention of the court.

The question of *'functus officio'* does not arise at the stage when the order made is not perfected yet. In this respect, I am in full agreement with Kamalanathan Ratnam J, in the *"Gang Cheng"* case, when His Lordship said (at p. 553):

> It is my judgment that a matter or 'res' in relation to *'res judicata'* is formally and finally decided or adjudicated by a court of law when the court's judgment, decision or order on the matter or 'res' is perfected, or in other words, passed and entered. I hold that only at that stage is a judge *functus officio* and is no longer seized of the matter and *res judicata* applies. Until this is done, the trial judge can vary, or modify his order or judgment.

An order is perfected when it is passed and entered by the court. In practice, when an order is pronounced by a court, one of the parties (usually in whose favour the order is granted) will prepare a draft order, send it to the other parties for approval or amendment (if any). After that the draft order is sent to the court's registrar for approval. Once the order is approved by the court registrar, a fair or formal order is prepared and sent to the court registrar for attestation and court seal.

Only at that stage of the process can an order be said to have been passed and entered or perfected.

However, I must stress here that this power ie, to amend or vary an order earlier granted, is not without limitations. It must be exercised judicially and not capriciously. It must only be exercised in exceptional cases where the justice of the case requires.

In fact, Fox LJ in *Pittalis & Ors. v. Sherefittin* [1980] 2 All ER 227 has said that the power is to be exercised only in exceptional cases. At p. 234-235, he said:

> ... As a matter of the sensible administration of justice and fairness between parties, it seems to me proper in the circumstances that the judge should be at liberty to recall his order. The position can properly be called exceptional.

In *Chua Wah Keaw v. Ng Ho Huat* [1961] 1 MLJ 321, Tan Ah Tah J (as he then was) said (at p. 322) as follows:

> It may perhaps be argued that the principle, laid down as it is in such wide terms, confers upon a judge an unlimited power to withdraw, or alter, or modify an order made by him which has not yet been perfected. But a perusal of the cases in which the power has been exercised indicates that the power is not as untrammelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced.

The above passage was adopted by Peh Swee Chin J in *Syarikat Marak Jaya* when he said the following:

> In my view, the nature of this power is not a blanket one; it is subject to a restriction which is, to correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order. The power is exercised concurrently with the express power to correct any clerical error, or any error arising from accidental slip or omission as expressly conferred by O. 20 r. 11 of the Rules of the High Court 1980.

At p. 813 (p. 27) of the same case, His Lordship went on to say:

> If such restriction does not exist, it will also somewhat destroy the fabric of the principle that there should be finality in litigation, for otherwise, the court may decide this way today and it may recall the parties and after further argument, decide in the opposite way tomorrow as was done in *Chuah Wah Keow*, this would somewhat bring some disrepute to the court unless such radical change is expressly authorized by any other written law.

In *Visia Finance Bhd. v. Expert Credit & Leasing Sdn. Bhd. & Ors.* [1998] 2 CLJ 845, the Court of Appeal held:

> As to the Judge's view that he could reopen the matter because no order had been perfected, it must be made clear that these curative powers may only be exercised under the slip rule if it can be clearly shown that the unextracted order was wrongly worded and in some way did not truly represent what was actually decided.

In exercising the power to amend or vary an order, the court must look at the intention of the court in pronouncing the order. The court may exercise the power in order to bring it into harmony with the order which the court

obviously intended or meant to pronounce. In *Millensted v. Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717, it was held by the Court of Appeal, at p. 726:

> It is now well settled, that until an order made by a judge has been perfected, by being passed and entered, there is no final order, and consequently the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make: see *Re Suffield & Watts; exp. Brown* 20 QBD 693; and no objection can therefore be taken, merely on the ground that the order, as drawn up, differs from the order that the learned judge originally stated he would make.

In this respect I am in full agreement with Kamalanathan Ratnam J in the *"Gang Cheng"* case, when His Lordship said:

> Surely, the court has an inherent power to vary its own order so as to carry out its own meaning as plainly as possible. To do justice, it is necessary that the Court be given a discretion to recall and correct any misgivings in its judgment before it is perfected, to bring it into harmony with the order which the court obviously meant to pronounce.

In exercising such power the court is not *functus officio*, as the order in question has not been perfected, and the court would hear it subject to the restrictions explained above.

In the present case, it is not in dispute that the order in question dated 14 May 2002 has not yet been perfected. Even though the draft order was prepared by the appellant's counsel and later approved by the respondent's counsel, the draft order has not been passed and entered by the court registrar. Therefore, based on the abovecited authorities and subject to the limitations and restrictions explained above, I hold that this court has in appropriate case, an inherent power to amend or vary its own order so long as the said order had not been perfected or passed and entered.

However, whether the court can grant the application as prayed or not, it must be determined on the facts and circumstances of the case. The court can only grant the application if justice of the case so requires, after taking into consideration all the relevant limitations and restrictions explained above.

In the present case, the appellant's claim against the respondents is on the respondents' letter of guarantee in respect of goods supplied and delivered to their company, Meister Plastic Industries Sdn. Bhd. The said company failed to pay for the said goods. At the Sessions Court Kuala Lumpur the appellant had applied for a summary judgment under O. 26A of the Subordinate Courts Rules 1980, but the application was dismissed. In order to obtain a summary judgment obviously the appellant has to convince the court (at the Sessions

Court as well as in this court) that the appellant's case is a plain and obvious case and that there is no triable issues need to be tried. The respondents have all along disputed the claim particularly on the question of interest (ie, 2% monthly interest). The appellants' counsel was aware of this matter. In order to convince the court (at appeal stage before the judge in chambers on 14 May 2002) the appellant counsel has informed the judge as follows (at p. 3 of the Notes of Proceedings):

> No triable issues. Defendants have not disputed the principal claim. They are only disputing the interest of less than RM3,000. We acknowledge that DN's (Debit Notes) at p. 35 and 36 charge interest at 30 days instead of 60 days. Plaintiffs are willing to waive the entire interest claimed. We seek judgment for the principal amount. Even if interest is at issue, computation would not be a triable issue. *Daya Amika* [1998)] 6 MLJ 537. We have not indicated earlier our willingness to forgo interest.

At one stage of the proceedings when the respondents' counsel wanted to submit on the question of interest, the judge indicated: "No need to submit on interest. Plaintiff have agreed to waive it." (p. 4, Notes of Proceedings). At the end of the proceedings, the judge made the following order:

> Appeal allowed with costs. But only for the sum of RM40,796.25 with interest from today at 8% until full settlement.

All these records clearly show that what the appellants' counsel told the judge is not slip of his tongue. It is not an accidental slip. He knew what he was saying and clearly meant it. Therefore the remedy under O. 20 r. 11 of the RHC 1980 does not apply. There is no error or accidental omission in the order as pronounced by the judge. The order pronounced clearly reflects what was intended or meant by the judge after being told by the appellants counsel that "the plaintiff was willing to waive the entire interest claimed." The judge's attention was directed to the issue of interest which was entirely waived by the appellant and from the order pronounced, it is clear that the judge has applied his mind to that issue. The said order really expressed the court's intention in the matter or in other words it is conformable with such manifest intention of the court. Therefore, it is not proper, based on the abovecited authorities, for me to amend or vary the said order. In arriving at my view, I adopted a passage by Morton J v. *In re Inchcape (Earl of), Craigmyle v. Inchcape* [1942] 1 Ch. 394, as follows:

> If a judge's attention is directed to a particular point, and, applying his mind to that point, he decides it, there can be no alteration under this rule, even if the judge has fallen into manifest error.

This passage was also adopted and applied by Ong Hock Thye FJ in *Lim Nam Rubber Works v. Leong Bee & Co (No. 2) (supra).*

From the records of the proceedings it seems that the appellant's counsel, in making such statements to the judge, had hoped to benefit from the statements so that the appellant's appeal can be allowed on ground that these was no triable issues, but subsequently he realised that such order (which was given based on what he had informed the judge) was financially onerous and later tried to amend or vary it. The effect of the amendment as prayed by the appellant is in total contradiction with what the appellant's counsel had informed the judge in getting the appeal allowed on 14 May 2002. Had the claim on interest not been waived by the appellant (as expressly informed by the appellant's counsel), the respondents might be allowed to submit on that point before the judge and the judge might not have decided in favour of the appellant in allowing the appeal. To allow the appellant's application under the present circumstances of the case would obviously prejudice the respondents. The appellant may have double bites on both sides of the cake.

The appellant's counsel in the present application raised the issue that the question of the 2% interest was agreed upon by the parties under the relevant agreement as well as under the letter of guarantee and therefore the appellant was entitled to the amount claimed. With respect, I am not able to accept this argument. The issue here is not whether the appellant is entitled to the interest claimed or not under the relevant agreement. The issue here is whether the appellant is entitled to a claim which he had willingly, effectively and voluntarily waived in a proceeding. The appellant may be entitled to the 2% interest under the relevant agreement, but at the same time, he may lose his entitlement if he willingly and voluntarily waived it. Under the circumstances, the question whether the appellant is entitled to the said interest under the relevant agreement does not arise anymore. Under the same circumstances, the question of "unjust enrichment" on the part of the respondents as alleged by the appellant, also does not arise.

The appellants' counsel admitted that he had made a mistake in waiving the said interest before the judge on 14 May 2002. Here, the issue of mistake was raised to support the present application to amend or vary the order. In my view, reading closely the notes of proceedings before the judge on 14 May 2002, there is no question of mistake on part of the appellants' counsel when he informed the judge that the appellant "willingly waived the entire interest claimed." The counsel knew the nature and consequence of the statement. He knew what he meant. He knew what he was going to achieve by making such statements before the judge. Even if, it is considered as a mistake on the part of the appellant's counsel, in my view, it is not within the scope of the power

to amend or vary the order having regard to the circumstances of the case. In arriving at my view, I adopted the approach in *Syarikat Marak Jaya*, where Peh Swee Chin J held:

> Having stated the above matters, in my view, the order in question in this instant case that was sought to be set aside on ground of misapprehension, mistake or fraud and being unperfected consent order, was certainly not within scope of the power to rehear having regard to the grounds stated in the application. I therefore exercised my discretion in refusing to rehear and reopen the case relating to the order in question on the grounds of mistake, misapprehension etc.

Conclusion

Having considered the submissions and all the authorities submitted by both parties, it is my judgment that this is not a proper case for the court to exercise its discretion to amend or vary the order in question. I therefore dismissed the appellant's application (encl. 10) with costs.